

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JOSEPH M. ANDERSON,

Case No.: 3:16-cv-00056-RCJ-WGC

Plaintiff,

Report & Recommendation of United States Magistrate Judge

Re: ECF Nos. 183, 193

Defendants.

This Report and Recommendation is made to the Honorable Robert C. Jones, Senior United District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 3.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Before the court is Plaintiff's Motion for Partial Summary Judgment. (ECF Nos. 183
n), 184-1 to 184-18 (exhibits), 189 (exhibit list)¹.) Defendant filed a response. (ECF No.
Plaintiff filed a reply. (ECF No. 196.)

Also before the court is Defendant's Renewed Motion for Summary Judgment. (ECF No. 198.) Plaintiff filed a response. (ECF No. 199.) Defendant filed a reply. (ECF No. 204.)

After a thorough review, it is recommended that both motions be denied.

I. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC), proceeding pro se with this action pursuant to 42 U.S.C. § 1983. (Am. Compl., ECF No. 7.) The

¹ See ECF No. 191 where the court had required Plaintiff to provide an explanation of the relevance of the voluminous exhibits, and he failed to do so with respect to exhibits 3, 5, 6, 7, 8, 11, 12, 13, 14, 16, 18, 23, 33, 34, 38, 42, 49, 53, 56, 57, 58, 59, 61, 64 and 66; therefore, the court indicated it would not consider those exhibits.

1 events giving rise to this action took place while Plaintiff was housed at Lovelock Correctional
2 Center (LCC). (*Id.*) The only remaining defendant is Jethro Parks.

3 Plaintiff originally sued for violations of the Free Exercise Clause of the First Amendment,
4 the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Equal Protection Clause
5 of the Fourteenth Amendment, retaliation in violation of the First Amendment, and civil rights
6 conspiracy. (ECF No. 1-2.) The court screened the complaint, allowing certain claims to proceed
7 and dismissing others with leave to amend. (ECF No. 5.) Upon amendment, the court allowed
8 Plaintiff to proceed with the RLUIPA, First Amendment retaliation, equal protection and civil
9 rights conspiracy claims, but dismissed a due process claim with prejudice. (ECF Nos. 7, 8.)

10 The defendants filed a motion for summary judgment arguing Plaintiff failed to exhaust
11 administrative remedies and statute of limitations defenses as to certain claims, and that the
12 retaliation claim against Parks failed on the merits. (ECF No. 27.) The undersigned issued a report
13 and recommendation that the motion for summary judgment be granted, except as to the retaliation
14 claim against Parks because of disputed factual issues. (ECF No. 66.) Both parties objected
15 (ECF Nos. 69, 70), and District Judge Jones overruled the objections and accepted and adopted
16 the report and recommendation in full. (ECF No. 76.) Plaintiff moved for reconsideration
17 (ECF Nos. 80), and District Judge Jones denied the motion (ECF No. 139).

18 Therefore, the only remaining claim is the retaliation claim against defendant Parks.

19 Plaintiff alleges that Parks subjected him to oppressive cell searches because of his religion
20 (he identifies as a Wiccan), which were intended to chill his right to practice his religion without
21 advancing any legitimate penological goal. (ECF No. 7 at 9.) He claims that Parks told him the
22 oppressive cell searches would stop if he changed his religion. (*Id.*)

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1 When Parks previously moved for summary judgment, he argued that he did not search
2 Plaintiff's cell or confiscate property due to his First Amendment conduct, but instead he followed
3 orders to conduct random cell searches for safety and security reasons. He asserted that during the
4 search he confiscated a bottle of an unknown liquid which Plaintiff claimed was baby oil. Baby
5 oil was permitted religious property, but if property is altered in any way it is considered
6 contraband subject to confiscation. Parks maintained that the baby oil was in a bottle with a label
7 held on with tape, which is not the way Plaintiff would have purchased it, and made it impossible
8 for the prison staff to verify its contents. For this reason, he confiscated it.

9 Plaintiff, on the other hand, did not dispute Parks may have been ordered to search his cell,
10 but maintained that Parks confiscated the baby oil because Plaintiff was a practicing Wiccan.
11 Plaintiff claimed: that Parks only searched Plaintiff's property, and not his cellmate's; Parks took
12 only religious property items; that he told Parks the property was authorized and he planned to use
13 it in a Wiccan ceremony, and Parks said, "You are not authorized to have group items in your
14 cell—you have been told this. "; Plaintiff asked him why officers kept taking his religious property
15 and frustrating his religious practices, and Parks said, "Perhaps you should change your religion
16 and your problems will go away." In addition, Plaintiff disputed the bottle was altered.

17 The court found there was a genuine dispute as to various material facts concerning
18 whether Parks confiscated items from Plaintiff's cell because of Plaintiff's First Amendment
19 activity, whether this chilled Plaintiff's exercise of his First Amendment rights, and whether the
20 action reasonably advanced a legitimate correctional goal. Following this, the court opened
21 discovery and set a new dispositive motions deadline. (ECF No. 84.)

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1 Plaintiff filed a motion for partial summary judgment arguing that there is evidence that
2 Parks followed orders to conduct a targeted search of only Plaintiff's property, to confiscate his
3 religious property, and that this was part of a custom of subjecting Plaintiff to these cell searches
4 in an attempt to modify his spiritual behavior. (ECF No. 183.) While he titles his motion as one
5 for partial summary judgment, he moves for summary judgment as to the only remaining claim.

6 Parks' renewed motion for summary judgment argues that he is entitled to qualified
7 immunity, and incorporates by reference the facts and exhibits presented on this claim in the
8 original motion for summary judgment. (ECF No. 193.)

9 **II. LEGAL STANDARD**

10 "The purpose of summary judgment is to avoid unnecessary trials when there is no dispute
11 as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468,
12 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary judgment, all
13 reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810
14 (9th Cir. 2008) (citation omitted). "The court shall grant summary judgment if the movant shows
15 that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
16 matter of law." Fed. R. Civ. P. 56(a). On the other hand, where reasonable minds could differ on
17 the material facts at issue, summary judgment is not appropriate. *Anderson v. Liberty Lobby, Inc.*,
18 477 U.S. 242, 250 (1986).

19 In evaluating whether or not summary judgment is appropriate, three steps are necessary:
20 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as
21 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.
22 See *Anderson*, 477 U.S. at 248-50. As to materiality, only disputes over facts that might affect the
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1 outcome of the suit under the governing law will properly preclude the entry of summary
 2 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

3 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 4 “When the party moving for summary judgment would bear the burden of proof at trial, ‘it must
 5 come forward with evidence which would entitle it to a directed verdict if the evidence went
 6 uncontested at trial.’ … In such a case, the moving party has the initial burden of establishing
 7 the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp.*
 8 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted).
 9 In contrast, when the nonmoving party bears the burden of proving the claim or defense, the
 10 moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
 11 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party cannot
 12 establish an element essential to that party’s case on which that party will have the burden of proof
 13 at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

14 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 15 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
 16 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
 17 dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute
 18 be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.” *T.W.*
 19 *Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation
 20 marks and citation omitted). “Where the record taken as a whole could not lead a rational trier of
 21 fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S.
 22 at 587 (citation omitted). The nonmoving party cannot avoid summary judgment by relying solely
 23 on conclusory allegations that are unsupported by factual data. *Id.* Instead, the opposition must go

1 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
 2 competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at
 3 324.

4 At summary judgment, the court's function is not to weigh the evidence and determine the
 5 truth but to determine whether there is a genuine dispute of material fact for trial. *See Anderson*,
 6 477 U.S. at 249. While the evidence of the nonmoving party is "to be believed, and all justifiable
 7 inferences are to be drawn in its favor," if the evidence of the nonmoving party is merely colorable
 8 or is not significantly probative, summary judgment may be granted. *Id.* at 249-50 (citations
 9 omitted).

III. DISCUSSION

A. Plaintiff's Motion

12 Preliminarily, the court notes that Plaintiff argues that he exhausted administrative
 13 remedies and that his claim is within the statute of limitations even though Defendants have not
 14 asserted the exhaustion or statute of limitations defenses as to this claim. Therefore, the court need
 15 not consider those arguments.

16 As the court advised the parties previously, "[s]ection 1983 provides a cause of action for
 17 prison inmates whose constitutionally protected activity has resulted in retaliatory action by prison
 18 officials." *Jones v. Williams*, 791 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802,
 19 806 (9th Cir. 1995). Such a claim consists of five elements:

- 20 (1) An assertion that a state actor took some adverse action against
 an inmate (2) because of (3) that prisoner's protected conduct, and
 that such action (4) chilled the inmate's exercise of his First
 Amendment rights, and (5) the action did not reasonably advance a
 legitimate correctional goal.

23 *Jones*, 791 F.3d at 1035 (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005))
 (internal quotation marks omitted).

1 Plaintiff argues that he is entitled to summary judgment because he has evidence that Parks
2 conducted a targeted search of only his property in an effort to confiscate his religious items, that
3 was part of a larger effort to modify Plaintiff's spiritual behavior.

4 Plaintiff presents his own affidavit stating that on July 12, 2014, Parks searched his cell;
5 searched only Plaintiff's property (not his cellmate's), and confiscated certain items that were his
6 religious property items. (Pl. Aff. ECF No. 184-8 at 15-16 ¶¶ 1-5.) The confiscated items included
7 what Parks characterized as a bottle with unknown liquid inside, which we now know was baby
8 oil. Parks told Plaintiff he was confiscating the items because they were considered contraband.
9 (*Id.* at 16-17 ¶ 7.) Plaintiff told Parks that he was a Wiccan practitioner and that he needed the
10 items for upcoming faith-related events. Plaintiff asked Parks why his cell was constantly being
11 searched and his religious items taken, and Plaintiff maintains that Parks responded: "Maybe you
12 should change your religion and your problems will stop." (*Id.* at 17 ¶¶ 6-8.) He also submits the
13 declarations of inmates Altamirano and Gibson, who state that they overheard this exchange.
14 (Gibson Decl., ECF No. 184-8 at 57 ¶ 15; Altamirano Decl., ECF No. 184-8 at 61 ¶ 10.)

15 Plaintiff contends that he asked Parks for an unauthorized property form so he could
16 dispute the confiscation of the items with the property room and through the grievance procedure.
17 (Pl. Aff., ECF No. 184-8 at 17 ¶ 8.) He claims that Parks went to the office and prepared the form,
18 and Plaintiff signed it. (*Id.* ¶ 9.) Gibson and Altamirano state in their declarations that they
19 observed Parks display the confiscated property to the unit correctional officers; give it to a search
20 and escort officer who examined it and handed it back to Parks; and then Altamirano saw Parks
21 throw the property in the trash. (Gibson Suppl. Decl., ECF No. 184-8 at 65, 67, 184-9 at 1; Gibson
22 Decl., ECF No. 184-8 at 58 ¶ 25; Altamirano Suppl. Decl., ECF No. 184-9 at 10.) Plaintiff went
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1 to the property room to have the property sergeant locate the confiscated property with no success.
2 (Pl. Aff., ECF No. 184-8 at 19 ¶¶ 21, 22.)

3 Plaintiff asserts that the baby oil bottle was not altered as the original label was still attached
4 to the bottle. (ECF No. 183 at 27.)

5 Parks disputes Plaintiff's version of events, and in particular the nature of the exchange
6 between Parks and Plaintiff, and whether third parties could have witnessed the cell search. As he
7 did in his own motion for summary judgment, Parks maintains that he searched the cell and
8 confiscated items that were unauthorized because he was ordered to do so as part of a number of
9 random cell searches, and not because of Plaintiff's faith. Parks also argues that Plaintiff admitted
10 in his grievance that the label on the bottle had been altered. Parks incorporates the declaration and
11 evidence filed in support of the original motion for summary judgment.

12 The parties have presented essentially the same facts as were raised Defendants' original
13 motion for summary judgment and Plaintiff's response with Plaintiff submitting additional
14 corroborating evidence. As the court found with respect to the prior motion, the court concludes
15 again that there are genuine disputes as to material facts that preclude the entry of summary
16 judgment in Plaintiff's favor.

17 As with the original motion, there is a dispute of fact as to Parks' intent behind executing
18 the search and confiscating the items from Plaintiff's cell. Parks maintains that he was ordered to
19 conduct random searches, and confiscated the items, including the baby oil bottle, because it was
20 altered and deemed contraband. Plaintiff, on the other hand, presents evidence that when he asked
21 Parks why his cell was being searched so often and why his religious property kept being taken,
22 Parks responded that if he changed his religion perhaps his problems would go away. Thus, there
23 is a dispute as to the causation element—whether the search and confiscation were done because

1 of Plaintiff's religion, or pursuant to prison policy concerning searches and contraband
2 confiscation.

3 This statement, which Parks disputes making, is also evidence that if believed by a jury
4 tends to show conduct that would chill a person of ordinary firmness from practicing his religion
5 in the future.

6 If a jury believes that Parks did not make this statement and that the bottle was indeed
7 altered, Parks presents credible evidence that the search and confiscation were in furtherance of a
8 legitimate correctional goal. If a jury believes Plaintiff's version of events—that Parks made that
9 statement, and the bottle was not altered—there is credible evidence that Parks' search and
10 confiscation were not in furtherance of a legitimate correctional goal.

11 The court's function at the summary judgment stage is not to weigh the evidence or make
12 credibility determinations. That is the province of the fact finder at trial. In light of these disputed
13 factual issues, Plaintiff's motion for summary judgment should be denied.

14 **B. Parks' Motion—Qualified Immunity**

15 Parks now argues he is entitled to qualified immunity. First, Parks contends that Plaintiff
16 admitted in his grievance that the bottle of baby oil was altered—that it had an altered label, and
17 that Plaintiff claimed it had allegedly been altered in 2008 by a different correctional officer. (A
18 at 7.) Since the label was altered, Parks could not have known what was in the bottle when he
19 searched the cell, and because it was altered it was contraband. Parks maintains, as he did
20 previously, that he confiscated the bottle because it was contraband, not because of Plaintiff's faith.
21 As a result, Parks argues that Plaintiff cannot demonstrate Parks retaliated against him based on
22 his faith.

1 Second, Parks argues the law was not clearly established that Parks' confiscation of the
2 bottle would violate Plaintiff's First Amendment rights. Specifically, he asserts it was not clearly
3 established that confiscating a bottle of unknown liquid with an altered label would not serve a
4 legitimate correctional goal.

5 The qualified immunity analysis consists of two steps: (1) viewing the facts in the light
6 most favorable to the plaintiff, did the defendant violate the plaintiff's rights; and (2) was the right
7 clearly established at the time the defendant acted. *See Castro v. County of Los Angeles*, 833 F.3d
8 1060, 1066 (9th Cir. 2016) (en banc), *cert. denied*, 137 S.Ct. 831 (Jan. 23, 2017).

9 Parks' motion fails at both steps.

10 First, Parks motion ignores that there are still disputed material facts, and most importantly,
11 there is a dispute as to whether Parks told Plaintiff when he confiscated the bottle that maybe he
12 should change his religion and his religious property would stop being confiscated. This goes
13 to whether the bottle was confiscated because of Plaintiff's religion and whether the confiscation
14 reasonably advanced a legitimate correctional goal. In addition, taking the facts in the light most
15 favorable to Plaintiff (the non-moving party with respect to the qualified immunity motion), even
16 if ordered to search Plaintiff's cell, Parks searched only Plaintiff's property and not his cellmate's;
17 he took only religious property; Plaintiff told Parks the property was authorized and he planned to
18 use it in the Wiccan ceremony; and when he was confiscating the property, Parks told Plaintiff that
19 if he changed his religion his religious property might stop being confiscated. These facts, if
20 believed by the jury, are sufficient to support a finding that Parks retaliated against Plaintiff. *See*
21 *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (inferences must be drawn in favor of the non-movant,
22 and the court may not resolve genuine disputes of fact in favor of the party seeking summary
23 judgment).

1 Second, it was clearly established at the time of this incident that if an officer took adverse
2 action against an inmate, such as confiscating an inmate's property because of the inmate's religion,
3 he could be liable for retaliating against the inmate. *See Rhodes v. Robinson*, 408 F.3d 559, 567-
4 68 (9th Cir. 2005).

5 Therefore, Parks' renewed motion for summary judgment should be denied.

IV. RECOMMENDATION

7 IT IS HEREBY RECOMMENDED that the District Judge enter an order:
8 (1) DENYING Plaintiff's motion for summary judgment (ECF No. 183); and (2) DENYING
9 Parks' renewed motion for summary judgment (ECF No. 193).

10 The parties should be aware of the following:

11 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
12 this Report and Recommendation within fourteen days of being served with a copy of the Report
13 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s Report
14 and Recommendation” and should be accompanied by points and authorities for consideration by
15 the district judge.

16 2. That this Report and Recommendation is not an appealable order and that any notice of
17 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
18 until entry of judgment by the district court.

19 DATED: January 8, 2019.

William G. Cobb

WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE